

IDAHO DEPARTMENT OF WATER RESOURCES

IBLA 76-281, 76-282 and 76-283

Decided April 20, 1976

Appeal from decisions of the Idaho State Office, Bureau of Land Management, rejecting applications I-8899, I-8903 and I-9473 for temporary withdrawals of lands for proposed development under the Carey Act.

Set aside and remanded.

1. Act of August 18, 1894 (Carey Act) -- Act of March 15, 1910 -- Regulations: Force and Effect as Law -- Withdrawals and Reservations: Temporary Withdrawals

In the absence of pertinent statutory directives or regulatory criteria mandating such action, it is improper for the Bureau of Land Management to reject applications filed by a state under the Act of March 15, 1910, for temporary withdrawals of lands for proposed development under the Carey Act, on the basis of the Bureau's determination that the Carey Act does not permit acceptance of a temporary withdrawal application: (1) for the establishment of residence and settlement on noncontiguous tracts of land; (2) if the acreage applied for, when added to desert land entry acreage previously patented to the state's Carey Act project proposer, exceeds the maximum 320 acres permitted to be acquired by one person under 43 U.S.C. § 212 (1970); and (3) when the preliminary plan of development submitted by the state fails to provide adequate assurance of water transmission to the proposed project. Under these circumstances, the Bureau should suspend action on the applications pending Departmental action to revise and recodify previously deleted regulations which provide guidance for the administration of the Carey Act and the Act of March 15, 1910.

APPEARANCES: Nathan W. Higer, Legal Counsel, Idaho Department of Water Resources, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Idaho Department of Water Resources has appealed from separate decisions of the Idaho State Office, Bureau of Land Management (BLM), dated September 12, 1975, rejecting State applications I-8899, I-8903 and I-9473 filed pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970), for the temporary withdrawal of lands for proposed development under the Carey Act of 1894, as amended, 43 U.S.C. § 641 et seq. (1970).

Application I-8899 (IBLA 76-283) was submitted by the State on behalf of the Little Valley Carey Act Project. The application was rejected by the BLM on the basis that the proposed preliminary plan of development did not establish adequate assurance of water transmission to the proposed project. The BLM decision stated:

The canal company [identified in the preliminary project plan] has filed a letter with this office stating they will not make any agreement with the Little Valley Carey Act Project for their use of the canal.

Since the contemplated use of the existing canal by the project sponsor is unacceptable, we do not believe that further consideration of the application for temporary withdrawal would serve any useful purpose. Therefore the application is hereby rejected.

Application I-8903 (IBLA 76-281) was filed by the State on behalf of the Melvin D. and Patricia A. Hughes Carey Act Project. The application was for three noncontiguous tracts of land totalling 320.33 acres. Application I-9473 (IBLA 76-282) was filed by the State on behalf of David H. Pierce, and was for 161.72 acres comprising two noncontiguous tracts. In 1968, an assignment of a desert land entry encompassing 241.12 acres was approved for Pierce, and he was subsequently issued a patent for the land in 1973.

The BLM rejected both of these applications based on its determination that the Carey Act did not permit the establishment of residence and settlement on noncontiguous tracts of land, and concluded, therefore, that there would be no purpose in accepting a temporary withdrawal application which contemplated such impermissible action. Application I-9473 was rejected for the additional reason that the BLM determined that the Carey Act did not permit acceptance of a temporary withdrawal application if the

acreage applied for, when added to the desert land entry acreage previously patented to the State's Carey Act project proposer, exceeded the maximum 320 acres permitted to be acquired by one person under 43 U.S.C. § 212 (1970).

The Idaho Department of Water Resources contends on appeal that the BLM has no authority under the Carey Act, the Act of March 15, 1910, or the regulations promulgated thereunder, to deny the temporary withdrawals for the reasons given.

Section 4 of the Act of August 18, 1894 (Carey Act), as amended, 43 U.S.C. § 641 (1970), reads in part:

To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is * * * authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands * * * binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied * * * within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands * * *.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved.

The Act of March 15, 1910, 43 U.S.C. § 643 (1970), provides for temporary withdrawals to aid in carrying out the purposes of the Carey Act. It states:

To aid in carrying out the purposes of section 641 of this title, it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: Provided, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made.

[1] Regulations pertaining to the Carey Act as well as those pertaining to temporary withdrawals under the Act of March 15, 1910, were deleted from Title 43 of the Code of Federal Regulations in 1970. 1/ 35 F.R. 3072 (1970). See Idaho Department of Water Resources, 21 IBLA 210, 212 n. 1 (1975). The directives within the deleted regulations were not thereafter included within any newly codified regulations. Upon inquiry to the BLM, Washington, D.C., the Board was informed that the deleted regulations are presently being revised and will be recodified in the near future. However, in the interim, there are no specific regulatory guidelines for administering the Carey Act or the Act of March 15, 1910. Accordingly, as an initial matter we find that there is no existing regulatory basis requiring rejection of appellant's temporary withdrawal applications. Cf. Phillips Petroleum Co., 61 I.D. 93, 100-01 (1953).

Furthermore, we are persuaded by appellant's arguments that neither the Carey Act nor the amendatory act permitting temporary withdrawals mandates rejection at this time of the State's applications for temporary withdrawal. Appellant urges that the

1/ The regulations under the Carey Act and the Act of March 15, 1910, were last published in 43 CFR 2222.6 (1970).

intent of the Act of March 15, 1910, is to allow a state and project sponsor one year in which to determine how the proposed project will be put together on the requested lands, and that in these cases the BLM has improperly prejudged the merits of the projects. With respect to application I-8899, appellant contends that the proposed plan which was submitted was only preliminary in nature and that an effective method of transporting water to the land can still be developed during the planning period provided for in the temporary withdrawal act.

As for applications I-8903 and I-9473, appellant argues that neither of the statutes in question requires that lands in a "project" be contiguous, and further points out that settlement may be effected by different individuals, with each reclaiming a separate, contiguous area. Finally, with reference to the project sponsored by David H. Pierce, a prior recipient of acreage under the desert land laws, appellant argues that: (a) "43 U.S.C. 212 is part of the Desert Entry and Homestead Act and does not apply to the provisions of the Carey Act * * *;" (b) as a "project sponsor" Pierce's status under the public land laws is immaterial as the sponsor could easily promote a project and open it for others to settle; and (c) even if the BLM's position is correct, this would only preclude Pierce from settling on more than 78.88 acres and the remaining land could be settled by other entrymen. Appellant also reiterates its general argument that the BLM is, in effect, passing on the merits of a project before giving the State an opportunity to present a proposal for segregation which would provide permissible methods of settlement under the Carey Act.

Without reaching appellant's specific objections to the BLM's determinations regarding contiguity and acreage limitation requirements, the Board concludes that in light of the intent expressed within the Act of March 15, 1910, it was improper for the BLM to reject appellant's temporary withdrawal applications. The obvious purpose of the Act was to remove desert lands from other forms of disposal for a limited period during which time the state and its project proposer would be given the opportunity to develop a plan of development consistent with the requirements of the Carey Act. The proper time to evaluate the merits of the proposed project is at the point when the state files its application for segregation under the Carey Act within one year after commencement of the temporary withdrawal.

While we find that it was improper for the BLM to have rejected appellant's applications, we do not believe that the public interest would be served by approving the applications at the present time. First of all, we note that, contrary to the position presented by

appellant, the rights to be acquired by a state under the Carey Act and the Act of March 15, 1910, are to be granted at the discretion of the Secretary. Idaho Department of Water Resources, supra. Accordingly, acceptance of appellant's applications for temporary withdrawal is not mandated by the statutes. In view of the absence of regulatory criteria to evaluate Carey Act applications, we conclude that appellant's applications for temporary withdrawal should be suspended pending recodification of the deleted regulations. We reach this decision on the basis that a temporary withdrawal granted under the Act of March 15, 1910, must be terminated after one year in the absence of submission by the state of its application for segregation. Without regulatory criteria to guide the State through the requirements for compliance with the Carey Act 2/ it is conceivable that the State would not be able to effectively develop its plans during the one-year period. Furthermore, in the event the State were to submit a plan after a withdrawal but before recodification of the pertinent regulations, the BLM would be without criteria to determine whether the State's plan adequately conformed to the requirements of the Carey Act. Under these circumstances, we conclude that both the State of Idaho and the Department of the Interior will be in a better position to effectuate their individual responsibilities with regard to the Carey Act if the status quo were maintained until recodification of regulations providing guidance for administration of the Carey Act and the Act of March 15, 1910. Cf. Energy Partners, 21 IBLA 352, 356-58 (1975). Accordingly, we direct the BLM to suspend action on appellant's applications for temporary withdrawal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions below are set aside and the cases remanded for action consistent with the views expressed herein.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

2/ The recodified regulations may resolve some of the questions raised by appellant's specific objections concerning the BLM's position on contiguity and acreage limitation requirements. In any case, it is premature at this time to reach those issues.

